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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SALINDER SINGH, Defendant and Appellant.	H033265 (Santa Clara County Super. Ct. No. CC778175)

Defendant Salinder Singh was convicted after jury trial of one count of second degree robbery and one count of attempted second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c), 664).[1] The trial court found that defendant had a prior serious felony conviction that also qualified as a strike (§§ 667, subds. (a) & (b)-(i), 1170.12), and that he had served a resulting prior prison term (§ 667.5, subd. (b)). Defendant filed a *Romero* motion,[2] but the court denied the motion and sentenced defendant to 11 years in prison.

On appeal, defendant contends that (1) the judgment must be reversed because he was without counsel during a critical stage of his trial, (2) the trial court committed

[1] Further unspecified statutory references are to the Penal Code.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497.

prejudicial instructional error, (3) the term for the prison prior enhancement should be stricken, and (4) the court erred in denying his *Romero* motion. The Attorney General concedes that the term for the prison prior enhancement should be stricken, and we find the concession appropriate. As we find no other prejudicial error, however, we will modify the judgment to strike the prison prior and affirm the judgment as so modified.

BACKGROUND

Defendant was charged by information with second degree robbery (§§ 211, 212.5; count 1), and attempted second degree robbery (§ 664; count 2).[3] The information further alleged that defendant had a prior serious felony conviction that also qualified as a strike (§§ 667, subds. (a) & (b)-(i), 1170.12), and that he had served a resulting prior prison term (§ 667.5, subd. (b)). On January 22, 2008, the court granted defendant's request to bifurcate trial on the alleged priors.

The Prosecution's Case

Between 10:00 and 11:00 p.m. on Saturday, August 25, 2007, friends Christopher Tucker, Katherine Bridges, and Jeffrey Bucago[4] met up at a Starbucks on El Camino Real in Santa Clara. While there, Tucker and Bridges saw several acquaintances, and they stood outside in the parking lot at the back of the Starbucks talking to them around 1:00 a.m. after Starbucks closed.

Defendant and two other men approached Bridges and Tucker's group. Although defendant and a second man did not say anything, the third man stood in front of them and tried to solicit money from the group. Bridges left the group after about 30 seconds and went to sit in the passenger seat of Bucago's car. Nobody in Tucker's group gave the

[3] The information included similar charges against Clinton Hayes and Gino Yi. Neither Hayes nor Yi is a party to this appeal.

[4] Bucago testified that he had been convicted of misdemeanor petty theft in 2002.

three men money. After about 10 minutes, Tucker left his group and walked the approximately 40 feet over to Bucago's car, and he, Bridges, and Bucago continued to watch defendant and his companions. They saw defendant take a small black handgun out from the small of his back, turn to look at Tucker, take the clip from the gun, inspect it, return it to the gun, and cycle the gun as if to load it. Defendant then returned the gun to the small of his back, turned back to face the group Tucker had been with, and just stood there.

Because Tucker feared for his friends' lives, Tucker and Bridges walked to the front door of the Starbucks, knocked on door to get an employee's attention, and asked the employee to call the police. The employee agreed to do so, and Tucker and Bridges waited by the door. Bucago stayed in his car and saw defendant take the clip out of the gun several more times before defendant and his companions left.

Defendant and his companions walked past the front of Starbucks, and headed into the parking lot. Police officers arrived within three or four minutes and Tucker flagged them down. He pointed in the direction of where defendant and his companions had gone. Defendant and his companions had approached some men in a car parked in the lot while defendant had his gun out, casually swinging it by his side.

Aleksandr Kulik was getting out of the passenger seat of Stephen Meggers's car in the Starbucks parking lot when defendant and his two companions approached the back driver's side of the car. The man in front of defendant's group spoke to Kulik over the roof of the car while defendant and the third man stood behind him. As the first man told Kulik he needed money, Meggers saw defendant pull a black handgun out from his waistband, take the clip out of it and put it back in. Meggers got out of the car and said that he did not have any money. Kulik gave the front man three dollars. Defendant raised the gun up and waived it around while talking with the third man. He pointed the gun at the third man but he did not specifically point the gun at either Kulik or Meggers.

The man in front told defendant to stop acting stupid and to put the gun away. The man said that defendant had had too much to drink.

Kulik saw the gun in defendant's hand, and the man in front said he needed more money. Kulik was afraid. He quickly gave the man two dollars more. Defendant and the third man walked off toward a Denny's restaurant and the first man asked again for more money. Meggers said "hustle somebody else." The first man started arguing with Meggers. The police arrived with their lights flashing. When the man who was doing the talking saw the police, he said " 'time to go,' " and followed his companions to the Denny's.

When Tucker next saw defendant and his companions about 10 minutes later, behind the Denny's restaurant next to Starbucks, Tucker noticed that defendant and one of his friends had switched shirts. Tucker identified defendant to the officers, and he identified defendant at trial, as the man who had held the handgun. Bridges and Bucago were not asked by the police to identify defendant but they identified him at trial as the man who had held the handgun. Meggers and Kulik also identified defendant at trial as the man with the handgun.

Santa Clara Police Officer Stephen Selberg responded to the Starbucks after hearing dispatch report a robbery. Other officers had already detained three suspects, including defendant, when Officer Selberg arrived. As he was leaving the scene after helping the other officers, Officer Selberg was flagged down by a couple in a car in the parking lot who told the officer that they had seen a gun under their car. The officer searched the indicated area and found an unloaded BB or pellet gun, which he seized and turned over to the other officers at the scene.

The Defense Case

The parties stipulated that a blood sample was obtained from defendant at 3:30 a.m. on August 26, 2007. The parties further stipulated that the blood sample was tested by the Santa Clara County Crime Lab and that the blood alcohol level was .10.

Halle Weingarten, a forensic toxicologist, testified as an expert that if defendant had a blood alcohol level of .10 at 3:30 a.m., his blood alcohol level at 1:30 a.m. would have been between .12 and .15. Alcohol is a central nervous system depressant, which affects a person's sensory input, rational thinking, and judgment. "So the people can say things or do things that they wouldn't ordinarily do."

Verdicts and Sentencing

On January 29, 2008, before the jury returned its verdict, defendant waived his right to a jury trial on the prior allegations. The jury found defendant guilty of both counts as charged in the information. On January 30, 2008, after a court trial, the court found the priors alleged in the information to be true.

On June 20, 2008, defendant filed a written request that the court exercise its discretion to dismiss the priors pursuant to section 1385. (*Romero*, *supra*, 13 Cal.4th 497.) The prosecutor had previously filed opposition to the request. After considering the papers and the probation report and hearing argument from the parties, the court denied the request to strike the priors. The court then sentenced defendant to prison for 11 years. The sentence consists of six years (double the midterm) on count 1 plus five years for the prior serious felony enhancement, and a concurrent term on count 2. The court did not impose punishment for the prison prior, stating "[t]he punishment is stayed pursuant to the case of *People v. Jones* [(1993) 5 Cal.4th 1142 (*Jones*)], because it is the same as the five year term."

DISCUSSION

Jury Note

On January 28, 2008, the court instructed the jury pursuant to CALCRIM No. 3550 that "[i]f you need to communicate with me while you are deliberating, send a note through the bailiff. Have it signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. If you have questions, I will talk with the attorneys

before I answer. So it may take some time. You should continue your deliberations while you wait for my answer. I will answer any questions in writing or orally here in open court." After the jury retired to begin its deliberations, the court stated to counsel, "any time there's a note you will be contacted . . . ."

The clerk's minutes for January 29, 2008, state that the jury was escorted into the jury room at 9:04 a.m. to continue their deliberations. At 10:35 a.m., the bailiff received jury note No. 1 from the foreperson. "Jury has a question regarding instruction as to the element of fear for grand theft of a person. Clerk contacts the People and the Defense informing them of the jury's question. People and Defense concur with the Court's response." The jury note No. 1 in the record states that the jury was seeking "clarification of degrees of theft – specifically robbery and grand theft – is fear a factor in grand theft." The court's signed and dated response was: "Fear is not an element (factor) of grand theft. The use of force or fear is an element (factor) of robbery. Please refer to instructions 1600 and 1801."

The clerk's minutes for January 29, 2008, continue, stating that the jury recessed for lunch at 11:55 a.m., and returned to continue their deliberations at 12:30 p.m. At 12:45 p.m., the bailiff received jury note No. 2 from the foreperson. "Jury has a question regarding instruction as to the element of force and fear." The jury note No. 2 in the record states: "Count 2 of the charges – states by means of force and fear – document 1600 – states force or fear in step 4. Need clarification of this of whether and or or." The court's signed and dated response was: "CALCRIM 1600. Robbery (Pen. Code § 211) is correct. The element of the crime ("step 4") is force or fear." However, nowhere in the record is there an indication of whether or not the written response was submitted to the jury.

The clerk's minutes for January 29, 2008, continue, stating that at 12:55 p.m., the bailiff was "informed that the jury has reached a verdict. The clerk contacts both [the prosecutor] and [defense counsel]." At 1:24 p.m., outside the presence of the jury,

defendant waived his right to a jury trial on the priors. The reporter's transcript in the record for January 29, 2008, begins at that time, and the reporter has filed an affidavit stating that "upon further review of my stenographic notes and the clerk's minutes, there was no mention of the juror's two questions in open court on the record."

Defendant contends that this record indicates that "there is no question that [defendant] was denied counsel during the formulation and delivery of the response to jury note #2." Defendant argues that, since the court's "mid-deliberations communication with the jury" without consulting defense counsel was "a complete deprivation of counsel" at "a critical stage of the trial," he was denied his constitutional rights to counsel, to due process, and to a fair trial, and reversal of the judgment is required "without any showing of prejudice."

The Attorney General contends that the record does not reflect that the trial court's "proposed response" written on jury note No. 2 was delivered to the jury. "Instead, the record reflects that the jury reported it had reached a verdict . . . 10 minutes after delivering [the note] to the bailiff, and before the parties and the trial court convened to discuss the judge's proposed response. The jury's ensuing verdict mooted the jury question posed in [the note], the trial court's proposed response, and any need for the parties to consider the judge's proposed response."[5]

There is a "general proscription against ex parte communications with a deliberating jury." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 70 (*Hawthorne*).) " 'Penal Code section 1138 requires that any questions posed by the jury regarding the law or the evidence be answered in open court in the presence of the accused and his or her counsel, unless presence is waived. Communication between judge and jury during deliberations

[5] The Attorney General initially argues that defendant waived any claim of error by failing to object below. Yet, if trial counsel was not informed that the trial court had prepared a response to the jury note, there is no way counsel could have objected to it.

without affording defendant and counsel an opportunity to be present impinges on a defendant's constitutional right to the assistance of counsel. [Citations.]' [Citations.] Ex parte instructions also implicate the defendant's right to personal presence at all trial proceedings. [Citations.]" (*Id*. at p. 69.)

"[A] trial court's instructions to a jury in a criminal case are given at a 'critical' stage of the proceedings and therefore, without the presence of counsel and absent a stipulation, comprise both constitutional and statutory error." (*People v. Dagnino* (1978) 80 Cal.App.3d 981, 988.) As our Supreme Court has explained, " '[I]t is most undesirable that anything should reach a jury which does not do so in the court room.' " (*Hawthorne, supra*, 4 Cal.4th at pp. 70-71.) "[T]he trial court should not entertain . . . communications with individual jurors except in open court, with prior notification to counsel. [Citation.] 'This rule is based on the precept that a defendant should be afforded an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant's case. [Citation.]' [Citation.]" (*People v. Wright* (1990) 52 Cal.3d 367, 402.)

We find that the record in this case does not support defendant's contention that the court communicated a response to jury note No. 2 to the jurors outside the presence of counsel. Rather, the record supports the finding that the court did not communicate such a response. The court instructed the jurors that it would talk to both attorneys before it responded to any questions posed by the jurors, so it might take some time before the jurors received a response and they should continue their deliberations while waiting for an answer. Thus, the court was aware of the proper protocol to follow when responding to a jury note. Second, the court followed the proper protocol before it responded to the first jury note at 10:35 a.m. The court prepared a proposed response, the clerk notified the attorneys of the proposed response, and the attorneys concurred with the proposed response before the response was communicated to the jury. At 12:45 p.m., the bailiff received a second note from the jurors asking for clarification of the instructions. A fair

reading of the clerk's minutes suggests that the second note was given to the court and the court prepared a proposed response while the jurors continued deliberating and, before the prosecutor or defense counsel were either notified of the second note or given the opportunity to address the court's proposed response, the jury reached a verdict. The record reflects that the jurors informed the bailiff at 12:55 p.m. that they had reached a verdict. The clerk then notified the prosecutor and defense counsel that the jury had reached a verdict. Accordingly, we find that defendant has not shown that the court erred or violated his rights to assistance of counsel, to due process, or to a fair trial by communicating with the jury outside his or his counsel's presence.

Jury Instruction

The court instructed the jury on the elements of robbery pursuant to CALCRIM No. 1600 as follows: "The defendant is charged in Count 1 with robbery in violation of Penal Code Section 211. To prove that the defendant is guilty of this crime, the People must prove, one, the defendant took property that was not his own; two, the property was taken from another person's possession and immediate presence; three, the property was taken against the person's will; four, the defendant used force or fear to take the property or to prevent the person from resisting; and five, when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently. [¶] The defendant's intent to take the property must have been formed before or during the time he used force and/or fear. If the defendant did not form this required intent until after using the force or fear then he did not commit a robbery. The property can be – the property taken can be of any value however slight. Fear as used here means fear of injury to the person himself or immediate injury to someone else present during the incident. [¶] An act is done against a person's will if that person does not consent to the act. In order to consent a person must act freely and voluntarily and know the nature of the act."

Defendant does not contest the correctness of the above instruction. However, he contends that the court should have also instructed the jury sua sponte that "the fear

required for robbery has an objective reasonableness component." Defendant argues that the element of fear in a rape case has both an objective and subjective component and, "[g]iven the similarity in language with respect to the element of fear in the rape statute (Pen. Code, [§] 261) and the robbery statute (Pen. Code, [§] 211), the definition of fear for these two statutes should be the same." Defendant cites *People v. Iniguez* (1994) 7 Cal.4th 847 (*Iniguez*), in support of his contention.

Iniguez is a rape case which held that the element of fear of immediate and unlawful bodily injury has two components, one subjective and one objective. "The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will. In order to satisfy this component, the extent or seriousness of the injury feared is immaterial. [Citations.] [¶] In addition, the prosecution must satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it." (*Iniguez*, *supra*, 7 Cal.4th at p. 856-857.)

The Attorney General first contends that defendant has forfeited his contention by failing to seek modification or clarification of CALCRIM No. 1600 in the trial court. The Attorney General alternatively contends that the court had no sua sponte duty to modify CALCRIM No. 1600 to further define the term "fear."

" ' "It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citations.]' [Citation.]" (*People v. Freeman* (1978) 22 Cal.3d 434, 437; *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

It is settled that the term "fear" as used in the definition of the crime of robbery has no technical meaning peculiar to the law that must be explained to the jury; it "must

be presumed to be within the understanding of jurors." (*People v. Anderson* (1966) 64 Cal.2d 633, 640; *People v. Griffin* (2004) 33 Cal.4th 1015, 1025-1026.) Case law supports the finding that the fear necessary for robbery is subjective in nature, as it requires the prosecutor to prove that the victim was in fact afraid, and that such fear allowed the crime to be accomplished. (*People v. Cuevas* (2001) 89 Cal.App.4th 689, 698; *People v. Anderson* (2007) 152 Cal.App.4th 919, 946.) The prosecutor need not elicit from the victim testimony regarding what precisely he or she feared, as fear may be presumed from the circumstances despite even contrary testimony from the victim. (See, e.g., *People v. Renteria* (1964) 61 Cal.2d 497, 499 [People not bound by store clerk's testimony that he was not in fear since there was other evidence to support conclusion that he acted in fear when he disgorged the contents of his employer's till].) However, defendant cites no authority for the proposition that the prosecution must prove, beyond a reasonable doubt, that a robbery victim's subjective fear is either that which a reasonable person would suffer under the same circumstances, or alternatively, if the fear is not reasonable, that the defendant knew of the victim's subjective fear and took advantage of it. Therefore, we find that the court had no sua sponte duty to instruct the jury in this case that the fear required for robbery must be objectively reasonable.

The Prison Prior Enhancement

The court found true the enhancement allegation that defendant had served a prior prison term (§ 667.5, subd. (b)) resulting from the same conviction underlying defendant's prior serious felony conviction (§ 667, subd. (a)). At sentencing the court stated that it was staying the one-year term for the prison prior enhancement pursuant to *Jones*, *supra*, 5 Cal.4th 1142. In *Jones*, the trial court imposed an enhancement under section 667, subdivision (a), and under section 667.5, subdivision (b), based upon one prior felony offense of kidnapping. (*Id*. at p. 1145.) Our Supreme Court determined in *Jones* that "in enacting what is now subdivision (a) of section 667, the voters did not intend that a defendant's sentence would be enhanced for both a prior conviction (under

the new statute) and the resulting prison term (under § 667.5)." (*People v. Murphy* (2001) 25 Cal.4th 136, 156.) Therefore, the *Jones* court "construed section 667 to bar the cumulative imposition of both enhancements" (*People v. Baird* (1995) 12 Cal.4th 126, 134), and remanded the case to the trial court with directions to strike the one-year enhancement imposed under section 667.5, subdivision (b). (*Jones, supra,* 5 Cal.4th at p. 1153.)

We agree with the parties that, under *Jones,* the one-year enhancement must be stricken rather than stayed. Accordingly, we will order the abstract of judgment modified by striking the section 667.5, subdivision (b) enhancement.

The Romero Motion

In discussing defendant's motion to dismiss his priors, the court found that defendant's strike prior was a residential burglary, "a serious prior strike offense." The court found that defendant's current offense "was a violent offense." The court noted that defendant "was drunk that night" and found that defendant had prior offenses involving alcohol abuse, methamphetamine use, and possession of marijuana, so he had substance abuse issues that he "need[ed] to deal with." The court found that defendant's juvenile record included bringing a weapon onto school grounds, battery, residential burglary, and probation violations, and that he had dropped out of high school. The court found that defendant's "adult record does not get any better," in that it included convictions or parole violations involving residential burglary, possession of stolen property, second degree burglary, misdemeanor possession of burglary tools, disorderly conduct, resisting arrest, disturbing the peace, petty theft with a prior, and second degree burglary, as well as the drug and alcohol offenses. The court found that defendant's parole officer found his overall performance on parole to be " 'horrible.' " The court also found that defendant, who was 23 at the time of sentencing, wanted to get his G.E.D., and wanted to turn his life around. In denying defendant's request to dismiss the priors, the court stated that "after consideration then of again the nature and circumstances of the

current offense, there was a trial, the strike prior, your character and background as well as your future prospects, I must conclude that you're not appropriate – this is not an appropriate case for me to exercise my discretion to strike your prior convictions."

Defendant now contends that the court abused its discretion in denying his motion to strike his priors. "This case is about abusing the use of alcohol and displaying a BB gun to get five dollars, which [led] to unintended consequences." "[I]t appears from the record that [defendant] has never had any treatment and rehabilitation program from his alcohol abuse problem." "Moreover, his background, character, and prospects are likewise favorable." "Finally, the Supreme Court cautioned trial courts not to place undue emphasis on a defendant's prior criminal record in determining whether to reduce a sentence."

The Attorney General contends that the record "demonstrates no abuse of trial court discretion."

In *Romero, supra*, 13 Cal.4th 497, our Supreme Court held that "section 1385[, subdivision](a) does permit a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law." (*Id.* at pp. 529-530.) The trial court may strike such prior convictions " 'in the furtherance of justice' " so that a defendant is not subject to the statutorily increased penalty. (*Id.* at p. 529.) In doing so, the court must not be " 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant,' while ignoring 'defendant's background,' 'the nature of his present offenses,' and other 'individualized considerations.' [Citation.]" (*Id.* at p. 531.)

The court provided further guidance in *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*). "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385[, subdivision](a), or in reviewing such a ruling, the court in question must consider whether, in light of the

nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Id*. at p. 161.) On appeal, a trial court's decision whether to strike a strike is "subject to review for abuse of discretion." (*Id*. at p. 162.)

In *People v. Garcia* (1999) 20 Cal.4th 490, the court reiterated the principles set forth in *Romero* and *Williams*, and added that "a defendant's sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (20 Cal.4th at p. 500.) " '[T]he superior court's order [i]s subject to review for *abuse of discretion*. This standard is *deferential*. [Citations.] But it is not empty. Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question "*falls outside the bounds of reason*" under the applicable law and the relevant facts [citations].' [Citation.]" (*Garcia*, *supra*, 20 Cal.4th at p. 503; see also *People v. Carmony* (2004) 33 Cal.4th 367, 375-376.)

Our review of the trial judge's remarks reflects that she was aware of her limited discretion to strike defendant's strike. After considering defendant's current and prior offenses, as well as his "background, character and prospects," the court concluded that defendant did not fall outside the spirit of the Three Strikes law. (See *Williams*, *supra*, 17 Cal.4th at p. 161.) Defendant cites no fact overlooked by the trial court. He simply invites us to reweigh the facts. An appellate court, however, is not authorized to substitute its judgment of the relative weights of factors properly considered by the trial court. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) "It is not enough to show that reasonable people might disagree about whether to strike . . . his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached

an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; see also *People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

We conclude on the record before us that the trial court did not abuse its discretion when it denied defendant's request to strike his prior conviction in the furtherance of justice.

DISPOSITION

The abstract of judgment is ordered modified by striking the Penal Code section 667.5, subdivision (b) enhancement. As so modified, the judgment is affirmed. The clerk of the superior court shall forward a copy of the modified abstract to the Department of Corrections and Rehabilitation.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

_____
MCADAMS, J.

_____
DUFFY, J.